



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 23, 1994

Mr. George M. Kirk
Gottesman, McAllister & Kirk, P.C.
8 Greenway Plaza, Suite 802
Houston, Texas 77046

OR94-583

Dear Mr. Kirk:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26027.

The Smithville Independent School District (the "school district"), which you represent, has received a request for information relating to a certain complaint lodged against the school district. Specifically, the requestor seeks "all information regarding your response to Julius Gordon" by letter dated March 1, 1994, "including 'falsified government records', and cost for added 'implementation of short term police security.'" In addition, the requestor seeks "your response to TWRCC, State Health [Department], EPA, CPS, and Smithville police regarding all issues outlined in the above mentioned letter." You advise us that the school district will release some of the requested information. You object, however, to release of the remaining information, which you have submitted to us for review and claim that sections 552.103 and 552.111 of the Government Code except it from required public disclosure.¹

At the outset, we address your contention that part of the request takes the form of a general inquiry and that part of it is "vague and overly broad." You advise us that the school district does not possess information responsive to the request and claim that the Open Records Act does not require the school district to compile information or to create documents in response to it. As a general matter, the Open Records Act applies only to

¹You also assert the attorney-client privilege, but do not identify the information to which it applies. See Open Records Decision No. 419 (1984) at 3 (stating that general claim that exception applies to entire document, when exception clearly does not apply to all information in document, does not comply with Open Records Act's procedural requirements). Accordingly, we do not address the applicability of the attorney-client privilege to the information requested here.

existing information and does not require a governmental body to prepare new information or to prepare information in a form the requestor demands. *See* Open Records Decision No. 572 (1990) at 1.

Other opinions of this office have addressed situations in which a governmental body has received either an "overbroad" written request for information or a written request for information that the governmental body is unable to identify. In Open Records Decision No. 561 (1990) at 8-9, this office summarized our policy with respect to such requests:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

Moreover, section 552.227 of the Government Code expressly does not require an officer for public records or the officer's agent to perform general research. *See also* Open Records Decision Nos. 563 at 8, 555 at 1 (1990); 379 (1983) at 4; 347 (1982) at 1. In response to the request at issue here, you must make a good faith effort to relate the request to information in the school district's possession and must help the requestor to clarify his request by advising him of the types of information available. Beyond these requirements, however, the school district need not generate new information or answer factual questions to comply with the request. However, since the information you submitted to our office clearly falls within the scope of the request, we will proceed to rule on the availability of this information.

Before addressing the exceptions to required public disclosure you assert under the Open Records Act, we note that the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, appears to govern some of the submitted information. FERPA provides, in pertinent part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

20 U.S.C. § 1232g(a)(1)(A). "Education records" are records that:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15; 447 (1986).

The requestor in this instance seeks information concerning his children, who are school district students. Some of the submitted information contains information directly related to his children. FERPA requires the release of such information to the requestor, notwithstanding the applicability of any of the exceptions asserted under the Open Records Act. *See* Open Records Decision No. 525 (1989) at 3.

Next, we address the applicability of the exceptions asserted under the Open Records Act to information not subject to FERPA. You claim that section 552.103 of the Government Code excepts the submitted information from required public disclosure. Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103(a) applies if litigation is pending or reasonably anticipated and the information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether the governmental body should claim section 552.103(a), that determination is subject to the attorney general's review. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3. This office determines on a case-by-case basis whether a governmental body reasonably may anticipate litigation. Open Records Decision No. 452 (1986) at 4.

You claim that the school district reasonably may anticipate litigation because the requestor verbally has threatened the department with litigation on two occasions. You also indicate that the school district is contemplating civil or criminal litigation with respect to this matter. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records

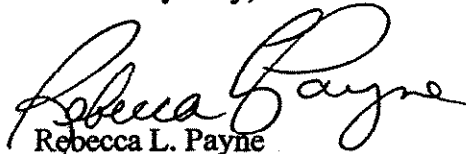
Decision No. 555 (1990). On the other hand, the mere fact that a requestor, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452. In addition, the contemplation of future litigation by a governmental body is insufficient to invoke section 552.103(a). Open Records Decision No. 557 (1990) at 6.

You have provided no information which indicates that the requestor has done more than publicly threaten the school district with litigation. Additionally, the mere fact that the school district might in the future bring civil or criminal actions against the requestor does not establish that litigation is pending or reasonably anticipated. We conclude, therefore, that the school district may not withhold the requested information under section 552.103(a) of the Government Code.

You also claim that section 552.111 of the Government Code excepts some of the requested information from required public disclosure. Section 552.111 excepts from disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993) this office reexamined the section 552.111 exception and concluded that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. In addition, this office concluded that an agency's policymaking functions do not encompass internal administrative or personnel matters. Open Records Decision No. 615 at 5-6. In this case, the requested information relates to an internal administrative or personnel matter, i.e., a parental grievance. Accordingly, section 552.111 of the Government Code does not except the submitted information from required public disclosure. The school district must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Rebecca L. Payne
Section Chief
Open Government Section

RLP/KKO/GCK/rho

Ref.: ID# 26027

Enclosures: Submitted documents